Supreme Court, U.S.
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No. 091441 MAY 25 2010

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Supreme Court of the United States

SANFORD I. ATKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is *coram nobis* relief available to a petitioner who was wrongfully convicted, served the sentence, and is not under any civil disabilities arising from the conviction?

2. If so, is *coram nobis* relief available to a petitioner who was wrongfully convicted on some charges but whose convictions on other charges remain valid?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings in the court of appeals below.

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PETITION FOR A WRIT OF CERTIORARI

Sanford Atkin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported and is reproduced in the Appendix at 1a–6a. The decision of the U.S. District Court for the Northern District of Ohio is reported at 2009 U.S. Dist. LEXIS 44559 and is reproduced in the Appendix at 7a–13a.

JURISDICTION

The court of appeals issued its judgment on February 25, 2010. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is the All Writs Act of 1789, which provides in relevant part as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

Sanford Atkin has served his sentence but he has new evidence showing that his earlier conviction is invalid. In the Fourth and Ninth Circuits, he would have the right to seek *coram nobis* relief to clear his name. In a majority of circuits, however, he has no such right. This case enables this Court to resolve the circuit split and provide uniformity for the many petitioners who seek *coram nobis* relief.

In 1995, a jury convicted Atkin, then a Cleveland attorney, of various offenses including four counts of income-tax evasion (in violation of 26 U.S.C. § 7201) and four counts of filing false tax returns (in violation of 26 U.S.C. § 7206). The district court sentenced Atkin to 63 months in prison and three years of supervised release. The Sixth Circuit affirmed, and the Ohio Supreme Court permanently disbarred him. In 1998, Atkin filed a motion to vacate his sentence under 28 U.S.C. § 2255. The district court denied that motion, and the Sixth Circuit affirmed. His term of supervised release ended as scheduled in 2003, and he was freed.

In 2008, Atkin filed a motion in the district court for relief from judgment under Civil Rule 60(b), seeking to overturn his conviction based on newly discovered evidence. He explained that in 2007 he filed a lawsuit in the U.S. Tax Court to challenge the tax liability underlying his conviction, and that the IRS acknowledged that for the four tax years in question, his taxes were paid and accounted for. Atkin argued that recently issued certificates of release of federal tax liens by the IRS in his favor represented newly discovered exculpatory evidence that

invalidated his conviction. The district court did not reach the merits of Atkin's Rule 60(b) motion. The court construed the motion as a second or successive § 2255 motion and transferred it to the Sixth Circuit so that it could issue the required permission to file such a motion (as called for by 28 U.S.C. § 2255(h)). The Sixth Circuit denied permission because Atkin was no longer in custody; § 2255 relief is available only to "[a] prisoner in custody . . . ." 28 U.S.C. § 2255(a).

Accordingly, Atkin filed a petition for a writ of *coram nobis* in the district court (such a petition—which in essence seeks the same relief as a § 2255 motion—is available when the petitioner is no longer in custody and has exhausted other avenues of relief). The basis for this petition, as with the § 2255 motion, was the newly discovered evidence. Yet the district court denied the petition, concluding that the claim had already been denied in the court's 60(b) ruling. Pet. App. 12a.

On appeal, however, the Sixth Circuit concluded that the district court erred: The district court had not earlier reached the merits of the 60(b) motion (it simply construed the 60(b) as a second or successive § 2255 motion and transferred it). Pet. App. 4a. The Sixth Circuit therefore addressed Atkin's argument that he was entitled to *coram nobis* relief in light of the newly discovered evidence.

The Sixth Circuit first recognized the deep split in the circuits on a fundamental question of *coram nobis*. The court noted that "[t]he majority of circuits require a petitioner to prove that his allegedly invalid conviction produced ongoing collateral consequences" as a prerequisite to *coram nobis* relief. Pet. App. 5a

(citing First, Second, Third, Fifth, Seventh, and Eighth Circuits). Such collateral consequences, also known as civil disabilities, include the loss of the right to vote or the right to hold occupational licenses. The court further noted, however, that "both the Fourth and Ninth Circuits" have reached a contrary conclusion, and the Supreme Court "has yet to decide" this question. Pet. App. 5a.

The Sixth Circuit ultimately denied relief to Atkin. It concluded that Atkin's arguments regarding the newly discovered evidence undermined only his tax-related convictions and that his other convictions would remain intact. Thus, the court reasoned, "*coram nobis* relief cannot provide Atkin with the underlying relief that he seeks." Pet. App. 6a. In other words, the court believed that *coram nobis* was unavailable to Atkin regardless whether he was under any civil disability stemming from the convictions. In the court's view, then, it did not need to decide whether having a civil disability from a challenged conviction is a prerequisite to *coram nobis* relief. The court's reasoning assumes, of course, that *coram nobis* relief is absolutely precluded where the petitioner has other convictions that would remain intact. (As noted below, that is not the view of some circuits.) In the end, the Sixth Circuit believed that it did not need to take a position on the circuit split, and it affirmed the district court's order dismissing Atkin's petition for *coram nobis* relief.

Atkin now respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The court below recognized that a majority of circuits—the "First, Second, Third, Fifth, Seventh and Eighth"—require a *coram nobis* petitioner "to prove that his allegedly invalid conviction produced ongoing collateral consequences," but that "both the Fourth and Ninth Circuits have held that the petitioner need not show that he is suffering from an ongoing civil disability." Pet. App. 5a (internal quotation marks omitted). Courts and commentators have criticized the majority's civil-disabilities test and stated that the time has come for this Court to resolve the issue: "As the number of petitions for coram nobis begins to rise, the flaws of the civil disabilities test will be cast in stark relief, and the circuit split over the issue ought to attract the attention of the Supreme Court." David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 B.Y.U.L. Rev. 1277, 1281 (2009).

Atkin's case enables this Court to resolve the question and provide uniformity for all criminal defendants seeking relief from a wrongful conviction after their release. This case is a particularly appropriate vehicle because it allows the Court to resolve a related, unresolved question: Is *coram nobis* relief available to overturn a conviction if a petitioner's other convictions will remain intact? Moreover, as this Court will shortly decide whether every conviction obtained under the "honest services" statute (18 U.S.C. § 1346) is invalid, clarity regarding these fundamental *coram nobis* principles will become even more pressing. Certiorari should be granted.

I. The Circuits Are Divided on the Availability of *Coram Nobis* Relief Where No Civil Disability Exists.

The circuit split arises from competing principles of finality and accuracy underlying *coram nobis*. This split is best understood with a brief preface discussing an overview of the writ itself.

A. Overview of *coram nobis* and the competing principles leading to the circuit split.

The writ of *coram nobis* has its roots in the common law of 16th-century England. Wolitz, *supra*, at 1283. In its traditional form, *coram nobis* provided a narrow opportunity for a court to reconsider a final judgment, primarily where new facts had come to light. *Id.* The phrase itself means "before us," which is a reference to the sovereign reviewing its own judgment. *Black's Law Dictionary* 338 (7th ed. 1999).

The writ came to the United States with the common law, and it maintained its traditional role as a means for trial courts to correct factual errors in decided cases. Wolitz, *supra*, at 1283. As courts crafted other mechanisms for correcting factual and clerical mistakes into the 1930s and 1940s, however, *coram nobis* became more and more rare. *Id.* at 1284. Indeed, the writ was abolished in civil cases by Federal Rule of Civil Procedure 60(b). What life remained in *coram nobis* was then squarely presented to this Court in *United States v. Morgan*, 346 U.S. 502 (1954).

In *Morgan* this Court held that *coram nobis* was alive and well. Wolitz, *supra*, at 1284. The defendant

there had pleaded guilty, without counsel, to various federal offenses when he was 19 years old. *Morgan*, 346 U.S. at 511. Years after his release, he sought *coram nobis* relief to vacate the conviction based on the denial of his right to counsel. *Id.* at 504. The Second Circuit concluded *coram nobis* was available, and this Court affirmed.

Though this Court recognized that the writ was not explicitly authorized by federal statute and had been abolished in civil proceedings, the Court found sufficient statutory authority for *coram nobis* in the All Writs Act of 1789, which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* at 506 n.6 (quoting 28 U.S.C. § 1651(a)). The Court further delineated when *coram nobis* relief was available, holding that it "should be allowed . . . only under circumstances compelling such action to achieve justice"—namely, (a) to cure errors "of the most fundamental character," when (b) "no other remedy [is] then available," and (c) when "sound reasons [exist] for failure to seek appropriate earlier relief." *Id.* at 511–12. The Court noted that the "wrong" of an unlawful conviction includes the abstract injustice in the system and may also include "results of the conviction," noting, for example, that "civil rights may be affected." *Id.* at 512–13. The Court concluded as follows: "As the power to remedy an invalid sentence exists, we think [Morgan] is entitled to an opportunity to attempt to show that his conviction was invalid." *Id.*

The dissenting opinion concluded that *coram nobis* relief should not be available to a petitioner who is no longer in custody. *Morgan*, 346 U.S. at 520 (Minton,

J., dissenting). The dissent recognized that "the record of a conviction for a serious crime is often a lifelong handicap," but concluded that relief should not be available if a person is merely suffering "a stain on his reputation." *Id.* at 519.

Ultimately, this Court described a petition for *coram nobis* relief as "of the same general character as one under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, *coram nobis* "became, in essence, habeas for those not in federal custody" and "a vital part of the post-conviction legal landscape." Wolitz, *supra*, at 1287, 1289. This Court reaffirmed the viability of the writ last term. *See United States v. Denedo*, 129 S. Ct. 2213, 2221 (2009) (stating that a federal court's "authority to grant a writ of *coram nobis* is conferred by the All Writs Act").

The greatest point of contention between the majority and the dissent in *Morgan*—the proper weight assigned to the competing principles of accuracy and finality—"still sets the terms of the debate surrounding *coram nobis* today." Wolitz, *supra*, at 1287. That debate is illustrated in the circuit split presented here: Is *coram nobis* relief available where the petitioner is not under a civil disability traceable to the wrongful conviction? And, if so, is the writ still available if a petitioner has other, valid convictions? The majority of courts says that relief is not available in either of those circumstances; a minority says it is available in both.

B. Majority view: *Coram nobis* is available only if the petitioner is under a civil disability.

The requirement that a *coram nobis* petitioner be under an ongoing civil disability first appeared to explicitly arise in the Seventh Circuit in the late 1980s. *Coram nobis* petitions came to the courts at that time in increasing numbers after this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, this Court invalidated mail-fraud convictions under 28 U.S.C. § 1341 based on a violation of the "intangible right" of the citizenry to have public officials perform their duties honestly. Persons convicted under this invalidated theory who had served their time sought relief via *coram nobis* petitions. In *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), the Seventh Circuit acknowledged that such petitioners had a "black mark" on their record but concluded that they must have an ongoing civil disability to avail themselves of the writ. *Id.* at 204. The interest in finality otherwise trumped the reputational harm. *Id.*

The Seventh Circuit's strict view—employing some form of the civil-disabilities test—soon became the dominant approach among the federal circuits. Wolitz, *supra*, at 1299; *see also Blanton v. United States*, 94 F.3d 227, 233 (6th Cir. 1996) ("The First, Second, Third, Fifth, and Eighth Circuits have followed the Seventh Circuit's lead . . . .").[1]

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[1] *See Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993); *Nicks v. United States*, 955 F.2d 161, 167 (2d Cir. 1992); *United States v. Osser*, 864 F.2d 1056, 1059–60 (3d Cir. 1988); *United States v.*

C. Minority view: *Coram nobis* is available even if the petitioner is under no civil disability.

Right around the same time as the Seventh Circuit developed the strict civil-disabilities test in the late 1980s, the Ninth Circuit eschewed it, concluding that reputational harm alone suffices for *coram nobis* relief. This holding arose in case centering on the internment of Japanese-Americans during World War II. In 1943 this Court upheld Gordon Kiyoshi Hirabayashi's conviction for violating the wartime curfew and interment orders. *Hirabayashi v. United States*, 320 U.S. 81 (1943). Four decades later Hirabayashi sought *coram nobis* relief on the basis of newly discovered evidence: A suppressed World War II report showed that the real rationale behind the orders was racial prejudice and not military exigency. *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987). He argued the convictions were accordingly invalid, and the Ninth Circuit held that *coram nobis* was available—even without a showing of ongoing civil disabilities. *Id.* at 606 ("We have repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction.").

Drobny, 955 F.2d 990, 996 (5th Cir. 1992); *Steward v. United States*, 446 F.2d 42, 43–44 (8th Cir. 1971). The Fifth Circuit is known to employ a lenient form of the civil-disabilities test; thus, some group it with the minority view typically ascribed to the Fourth and Ninth Circuits. *See, e.g.*, *United States v. Loftus*, 796 F. Supp. 815, 823 (M.D. Pa. 1992) ("In contrast to the Fourth, Fifth and Ninth Circuits, the Seventh Circuit has taken a restrictive stance on the question of collateral consequences.").

The Fourth Circuit takes a similar approach. *See United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988) (granting *coram nobis* relief and noting that, without it, petitioners "would face the remainder of their lives branded as criminals . . . ."). The Fourth Circuit also noted that "[c]onviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Id.* at 1075 n.12 (quoting *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting)). *See also Loftus*, 796 F. Supp. at 823 ("The [Fourth Circuit's] observation [in *Mandel*] that petitioners would be 'branded as criminals' without *coram nobis* relief aligns the Fourth Circuit with the Ninth Circuit. In essence, the *Mandel* Court, like the *Hirabayashi* Court, presumes that consequences collateral to an invalid conviction exist.").

Finally, as noted, the Fifth Circuit is at times considered to be aligned with the Ninth and Fourth. *See id.* at 822 ("It appears . . . that the Court of Appeals for the Fifth Circuit requires collateral consequences but, like the Ninth Circuit Court of Appeals, takes a lenient approach."); *cf. United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (noting collateral-consequences requirement and granting writ but not identifying particular consequences suffered).

Because the minority approach recognizes that reputational harm from a conviction is damaging enough for federal relief, *coram nobis* is available under this approach even if the petitioner has other convictions that would remain intact. *See United States v. Walgren*, 885 F.2d 1417, 1421–22 (9th Cir. 1989) (assuming that conviction on one count is valid

and granting *coram nobis* relief on two other counts). Indeed, in *Hirabayashi* the district court did not vacate all of the petitioner's convictions. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986) (district court did not vacate all of petitioner's convictions even though it concluded that *coram nobis* was appropriate).

By contrast, the Sixth Circuit here concluded that *coram nobis* relief was simply unavailable because the collateral consequences of Atkin's other convictions would remain intact—even if his tax-related convictions were invalid. Pet. App. 6a. Thus, inherent in the broad circuit split regarding the civil-disabilities test lays a related unresolved question on this particular point about the effect of additional convictions. As discussed below, the minority view takes the proper approach.

II. The Minority View Is Proper.

The civil-disabilities test is inconsistent with this Court's decision in *Morgan*. That decision simply held that federal courts have the power under the All Writs Act to provide relief in the form of *coram nobis* to vacate criminal convictions that are, upon proper showing, invalid. Wolitz, *supra*, at 1304. The Court mentioned examples of a conviction's collateral consequences not to create a "new barrier" to *coram nobis* relief but to "underscore the importance" of providing relief to convicted persons who are no longer in custody. *Id.*

Moreover, this Court's precedent can be read to favor the minority approach. *See Sibron v. New York*, 392 U.S. 40, 55 (1968) (stating that this Court has

"acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences") (addressing mootness in criminal appeals) (citing *Pollard v. United States*, 352 U.S. 354 (1957)); *see also Loftus*, 796 F. Supp. at 826 ("[C]ontrary to the position of the Seventh Circuit . . ., *Sibron* could support the Ninth Circuit's presumption that 'collateral consequences flow from any criminal conviction.'").

The minority view also adheres to long-standing principles that reputational harm—particularly the stigma of a wrongful criminal conviction—is cognizable in federal court. The civil-disabilities test arises in part from the idea that reputational harm alone is insufficient to trigger a "case or controversy" under Article III of the Constitution. *See, e.g.*, *Keane*, 852 F.2d at 204 ("A strong emotional interest is not enough to produce an Article III case or controversy."). Yet "conventional standing doctrine and common-law defamation are two well-established areas of law that already recognize reputational harm as real, weighty, and deserving of legal redress." Wolitz, *supra*, at 1310; *see also, e.g.*, *Meese v. Keene*, 481 U.S. 465, 472–77 (1987) (discussing reputational harm in context of standing).

Indeed, lower courts have expressed disagreement when their controlling court of appeals adopts the stricter majority approach. *See, e.g.*, *Loftus*, 796 F. Supp. at 826–27 ("While this Court would prefer the liberalized attitude of the Fourth, Fifth and Ninth Circuits, it will be assumed that [the Third Circuit] Court of Appeals would opt for the more exacting standard adopted by the Seventh Circuit.").

III. This Case is a Vehicle to Clarify Both the Main Circuit Split and the Unresolved Question Regarding the Effect of a Petitioner's Additional Convictions.

Under the minority approach, Atkin's case would have come out differently; *coram nobis* would be available to him.

As the court below recognized, Atkin argued that the "recently issued certificates of release of federal tax liens by the IRS in his favor, which cancelled 'almost half a million dollars of liens filed for those tax years,' represented newly discovered exculpatory evidence that was never disclosed to him during his criminal trial or appeal." Pet. App. 3a. Yet the court denied relief because it concluded that his convictions on other charges would be unaffected.

The question is whether that result should change—particularly under the minority approach—even if one assumes that his other convictions would remain intact.[2] If this Court endorses the minority's position on the circuit split (i.e., *coram nobis* is available to remedy reputational harm from an invalid conviction without a showing of specific civil disabilities), it should further clarify that this position holds true regardless of any convictions on additional charges. Contrary to the lower court's

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[2] For purposes of proceedings in this Court, Atkin concedes that his non-tax-related convictions are valid. He does not, however, waive any future argument in the lower courts that the Government's failure to disclose the exculpatory tax-related evidence undermined the jury's entire verdict, thus invalidating all counts on which he was convicted.

view here that reaching the circuit split was unnecessary, the minority approach would indeed have entitled Atkin, like Hirabayashi, to pursue the writ of *coram nobis*, regardless of other convictions. *See* Wolitz, *supra*, at 1339 ("Unfortunately, the overwhelming majority of other circuits have adopted a coram nobis jurisprudence that would have denied relief to Hirabayashi and, in fact, denies relief to deserving petitioners today.").

IV. This is An Important Federal Question That Will Affect Any Defendant Seeking to Invalidate a Conviction After Release.

As noted, courts and commentators have discussed the circuit split and the need for this Court to resolve it. *See, e.g.*, *Loftus*, 796 F. Supp. at 822 ("[T]here is a dispute among the circuits with respect to what constitutes collateral consequences sufficient to warrant *coram nobis* relief . . . ."); *id.* at 819 ("With respect to the collateral consequences component of the *coram nobis* test, the Courts of Appeals have adopted divergent standards . . . ."). But the deep division in the circuits is not the sole reason that this case warrants this Court's review.

The questions presented affect every person whose federal conviction is deemed invalid after serving a sentence. While those conditions will arise in different ways in particular cases, they also arise in broad numbers whenever a federal criminal statute is narrowed or deemed unconstitutional. *See, e.g.*, *id.* at 815 (granting *coram nobis* relief to petitioner who was convicted under § 1341 before it was limited by this Court in *McNally*); *see also* Wolitz, *supra*, at 1339 ("The civil disabilities test acts as a roadblock to the

proper functioning of [the writs of habeas corpus and coram nobis], keeping out a whole class of post-conviction review cases for reasons that do not stand up to scrutiny.").

Indeed, as just one example, the Court is currently reviewing whether to issue such a broad ruling with regard to 18 U.S.C. § 1346, which prohibits depriving another of the intangible right of "honest services." That statute is the subject of three pending cases. *Skilling v. United States*, No. 08-1394 (whether the statute is unconstitutionally vague); *Black v. United States*, No. 08-876 (whether the "honest services" clause of the statute applies in cases where the jury did not find that defendants "reasonably contemplated identifiable economic harm"); *Weyhrauch v. United States*, No. 08-1196 (whether conviction under the statute for non-disclosure of material information requires proof that defendant violated a disclosure duty imposed by state law). "There is a serious argument that § 1346 is nothing more than an invitation for the federal courts to develop a common-law crime of unethical conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from the denial of certiorari). If the Court invalidates or narrows § 1346, as it did § 1341 in *McNally*, many *coram nobis* petitions will follow. *See* Wolitz, *supra*, at 1293 (noting that after *McNally* defendants convicted under § 1341 "brought coram nobis petitions to vacate their convictions"). And many of the petitioners, like Atkin, will have additional convictions that are unaffected by the ruling. The lower courts' need for guidance with respect to *coram nobis* is apparent—and only this Court's intervention can provide it.

With Atkin's case, this Court can resolve the split regarding the prerequisites for *coram nobis* relief, and it can clarify whether the writ is available when a petitioner's other convictions remain intact. There will then be uniformity in federal courts across the country as they are inevitably asked to decide whether people who have served their sentence may seek relief from a wrongful conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 2010

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-3770

[Filed February 25, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
SANFORD I. ATKIN,	)
	)
Defendant-Appellant.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: KEITH, CLAY, and KETHLEDGE, Circuit Judges.

Sanford I. Atkin, an Ohio resident proceeding *pro se*, appeals a district court order denying his petition for a writ of *coram nobis*. He also moves for appointment of counsel. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1995, a jury convicted Atkin, then a Cleveland attorney, with various offenses including two counts of obstruction of justice, in violation of 18 U.S.C. § 1503; seven counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. § 2314; eleven counts of engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. § 1957; four counts of income tax evasion, in violation of 26 U.S.C. § 7201; four counts of filing false tax returns, in violation of 26 U.S.C. § 7206; and a final count which sought criminal forfeiture of $230,202, pursuant to 18 U.S.C. § 982, based on the involvement of the funds in Atkin's violation of 18 U.S.C. § 1957. Atkin was sentenced to sixty-three months in prison, to be followed by three years of supervised release. We affirmed the conviction and sentence, *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997), and the Ohio Supreme Court permanently disbarred Atkin. *Office of Disciplinary Counsel v. Atkin*, 704 N.E.2d 244 (Ohio 1999).

In 1998, Atkin filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, which was denied. Atkin appealed unsuccessfully to this court and the Supreme Court. Atkin thereafter pursued early termination of supervised release on multiple occasions with no

success. His term of supervised release, however, ended as scheduled in 2003.

In 2008, Atkin filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). He argued that in 2007 he filed a lawsuit in the United States Tax Court to challenge the tax liability underlying his conviction, and that the Internal Revenue Service (IRS) acknowledged that for the four tax years in question, his taxes were paid and accounted for. Atkin had claimed that recently-issued certificates of release of federal tax liens by the IRS in his favor, which cancelled "almost half a million dollars of liens filed for those tax years," represented newly discovered exculpatory evidence that was never disclosed to him during his criminal trial or on appeal. The district court denied the motion. Finding that Atkin was challenging his underlying conviction and sentence, it construed the Rule 60(b) motion as a second or successive § 2255 motion and, by separate order, transferred Atkin's motion to this court pursuant to 28 U.S.C. § 2255(h). We denied Atkin permission to file a second or successive § 2255 motion because he was no longer in custody.

Atkin thereafter filed his petition for a writ of *coram nobis* arguing that he had no other remedy available to him to challenge his convictions for income tax evasion. The district court denied Atkin's *coram nobis* petition and also his request for a hearing.

On appeal, Atkin argues that the district court erred by denying his petition for *coram nobis* relief and also by not conducting a hearing. The government, in response, argues that Atkin's claim is barred by the

doctrine of laches but, in any event, fails to satisfy the requirements for *coram nobis* relief.

When a district court denies *coram nobis* relief, we review its determinations of legal issues *de novo*, but its findings of fact for clear error. *United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001) (internal citation omitted). "*Coram nobis* is an extraordinary writ, used only to review errors of the most fundamental character – *e.g.*, errors rendering the proceedings themselves invalid." *Id.* (internal citation omitted). Where, as here, a petitioner is no longer in custody, a writ of *coram nobis* is available. *Id.* But a petitioner is not entitled to relief unless he demonstrates "(1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known." *Id.* (internal citation omitted).

We agree with Atkin that the district court erred by denying his petition on the basis that the district court had previously decided the claim on the merits when it adjudicated Atkin's Rule 60(b) motion. The district court's order denying Atkin's Rule 60(b) motion shows that it did not reach the merits of Atkin's claim, but rather denied the motion on the basis that the motion was construed as a second or successive § 2255 motion that could not be filed with the district court without prior permission from this court. In any event, we affirm the district court's order denying Atkin's petition for *coram nobis* for reasons not stated by the district court. *See City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251-52 (6th Cir. 1994).

We do not find persuasive the government's argument that Atkin's petition was barred by the doctrine of laches. Even assuming that the doctrine applies to petitions for *coram nobis*, *see Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996) ("laches may apply to *coram nobis* proceedings"), we find that Atkin did not file his petition after an unduly long delay. On the other hand, we do find persuasive the government's argument that granting Atkin *coram nobis* relief would not provide Atkin with the relief he seeks and, on this basis, we affirm the district court's order.

Atkin argues that, because of his convictions for income tax evasion and filing false tax returns, he has suffered from "adverse consequences," i.e., not being able to "hold any licence of any kind or nature"; "own a rifle or firearm to hunt with"; and "vote or participate on a jury."

Neither the Supreme Court nor our circuit has yet to decide whether a*coram nobis* petitioner bears the burden of showing a "civil disability" or, in other words, that he suffers from collateral consequences as a result of his conviction. Such collateral consequences include "the loss of the rights to vote, hold occupational licenses, or bear arms, and the imposition of enhanced penalties for future sentences." *Blanton*, 94 F.3d at 232. The majority of circuits require a petitioner to prove that his allegedly invalid conviction produced ongoing collateral consequences. *Id.* at 233 (citing First, Second, Third, Fifth, Seventh and Eighth Circuits). But both the Fourth and Ninth Circuits have held that the petitioner "need not show that he is suffering from an ongoing civil disability." *Id.* Both Circuits have reasoned that collateral consequences

naturally stem from a criminal conviction. *See United States v. Mandel*, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988); *Hirabayashi v. United States*, 828 F.2d 591, 606 (9th Cir. 1987).

We need not reach this issue because, as argued by the government, Atkin has only challenged his tax-related convictions and has not challenged his convictions of obstruction of justice, interstate transportation of property obtained by fraud, and engaging in a monetary transaction in criminally derived property. Thus, Atkin cannot show that granting *coram nobis* relief will end the collateral consequences from which he suffers; they would continue to exist because of his other convictions. Atkin has not argued that the adverse consequences stem specifically from his convictions for tax evasion and filing false tax returns. Accordingly, *coram nobis* relief cannot provide Atkin with the underlying relief that he seeks.

Finally, we find that the district court did not abuse its discretion denying Atkin's request for a hearing. *See Blanton*, 94 F.3d at 235 (internal citations omitted).

For the above reasons, we affirm the district court's order. Atkin's motion for appointment of counsel is denied as moot. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:94-CR-378

[Filed May 27, 2009]

UNITED STATES,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SANFORD I. ATKIN,	)
	)
Defendant.	)
	)

OPINION & ORDER
[Resolving Doc. Nos. 340, 341.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On May 18, 2009, Defendant Sanford I. Atkin filed a petition for a writ of *coram nobis*, [Doc. 340], as well as a motion for appointment of counsel, [Doc. 341.] In his petition, Atkin claims that he is actually innocent and that his convictions for obstruction of justice, causing the interstate transportation of money obtained by fraud, monetary transactions in criminally

derived property, income tax evasion, and filing false tax returns were obtained through "creative lawyering and conspiracy on behalf of the [G]overnment prosecutors at [Atkin's expense] and in violation of sound statutory interpretation, fair warning principles, and basic goals and values of the criminal law." [Doc. 340-2 at 2.] On May 20, 2009, the United States filed a motion in opposition to Atkin's petition for a writ of *coram nobis*. [Doc. 342.]

For the following reasons, the Court **DENIES** Defendant Atkin's petition for a writ of *coram nobis* and his motion for appointment of counsel.

I. Background

The Court incorporates its summary of this case's background from its order denying Defendant Atkin's motions to vacate and set aside the verdict and judgment and for appointment of counsel. [Docs. 337, 265.]

> In November 1994, a federal grand jury returned a twenty-nine count indictment against Defendant-Movant Atkin. The indictment charged Atkin with soliciting and receiving $550,000 from a defendant in a federal criminal trial by falsely representing that he would use the funds to bribe the federal judge presiding over the trial. The specific counts in the indictment ranged from obstruction of justice to income tax evasion.[1/]

[1/] Counts 1 and 2 charged Atkin with obstructing justice; Counts 3 through 9 charged Atkin with interstate transportation of

> In June 1995, a jury convicted Atkin on twenty-eight of the twenty-nine counts in the indictment. Thereafter, Atkin began serving a sixty-three month prison sentence[2/] in federal prison.
>
> In September 1995, Atkin appealed his conviction to the United States Court of Appeals for the Sixth Circuit. In 1997, the Sixth Circuit affirmed Atkin's conviction.[3/]

On February 12, 1998, Defendant Atkin petitioned the Court to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. [Doc. 213.] The case was subsequently reassigned from Judge David D. Dowd, Jr. to this Court on October 13, 1999. [Doc. 257.] On January 7, 2000, this Court denied Atkin's § 2255 petition. [Docs. 264, 265.] Atkin's related appeals to the Sixth Circuit and United States Supreme Court were denied. [Docs. 253, 259, 262, 266, 276, 277 & 281.] On May 20, 2008, Atkin filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), as well as a motion for appointment of counsel. [Docs. 330, 331 & 334.] The Court denied both motions on July 23, 2008, [Doc. 337],

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property obtained by fraud; Counts 10 through 20 charged Atkin with engaging in monetary transactions with criminally derived funds; Count 21 charged Atkin with witness tampering; Counts 22 through 25 charged Atkin with income tax evasion; and Counts 26 through 29 charged Atkin with filing false income tax returns.

[2/] Atkin was acquitted of witness tampering.

[3/] *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997) (affirming Atkin's conviction on direct appeal).

characterizing Atkin's 60(b) motion as a second or successive petition for habeas relief and transferring the petition to the Sixth Circuit for that court's consideration, [Doc. 338.] On January 22, 2009, the Sixth Circuit denied Atkin's motion to file a second or successive habeas petition and denied as moot his motion for appointment of counsel. [Doc. 339.]

Having been released from prison after serving his sentence, Atkin now files a petition for a writ of *coram nobis*, as well as a motion for appointment of counsel. [Docs. 340, 341.]

II. Legal Standard

The writ of error *coram nobis* is an extraordinary writ and the jurisdiction of the court to grant such relief is of limited scope. *See, e.g., United States v. Norman*, 391 F.2d 212, 213 (6th Cir.), *cert. denied*, 390 U.S. 1014 (1968). Further, the writ of "*[c]oram nobis* is . . . used only to review errors of the most fundamental character – *e.g.*, errors rendering the proceedings themselves invalid." *United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001) (citations omitted). To establish that he is entitled to relief pursuant to this writ, a petitioner must show "(1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known." *Id.* (citations omitted). The writ of *coram nobis* is only available when a § 2255 motion is unavailable – generally, when the petitioner has served his sentence completely and thus is no longer in custody. *See id.*

As applied to criminal cases, the writ of *coram nobis* is used to raise claims that were not apparent from the face of the record and, understandably, not raised at trial. *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989). "The writ of error *coram nobis* is limited to defects that sap the proceeding of any validity. It was and is not a device to relitigate issues fully ventilated at the time of the conviction." *Id.* at 203 (citations omitted); *see also Keener v. Ridenour*, 594 F.2d 581, 589 (6th Cir. 1979) ("Post-conviction collateral action, in the form of habeas corpus *coram nobis*, or under a unified statutory system of post-conviction relief, is intended to allow judicial review of fundamental issues not considered in a prior proceeding.").

Neither the Supreme Court nor the Sixth Circuit have decided "whether an ongoing civil disability is required for *coram nobis* relief," *Blanton v. United States*, 94 F.3d 227, 232 (6th Cir. 1996) (emphasis added), though a majority of the courts of appeals have held that *coram nobis* "petitioners are required to show that their allegedly wrongful conviction actually results in an ongoing civil disability." *Id.* at 233. To merit *coram nobis* relief, a civil disability must (1) cause a present (not speculative or past) harm; (2) arise out of the erroneous conviction; and (3) have the potential of causing more than incidental harm. *See United States v. Craig*, 907 F.2d 653, 658 (7th Cir. 1990) (footnote omitted), *amended on other grounds*, 919 F.2d 57 (7th Cir.), *cert. denied*, 500 U.S. 917 (1991). "Civil disabilities include the loss of the rights to vote, hold occupational licenses, or bear arms, and the imposition of enhanced penalties for future sentences." *Blanton*, 94 F.3d at 232; *see also Keane*, 852 F.2d at 203.

III. Analysis

The Court denies Defendant Atkin's petition for *coram nobis*, as Atkin has failed to demonstrate the existence of a fact unknown at the time of trial of a fundamentally unjust character that probably would have altered the outcome of the trial if it had been known. Because Atkin's *coram nobis* petition has no merit, the Court also denies Atkin's motion for appointment of counsel.

In his petition, Atkin asks that the Court grant his request for a writ of *coram nobis* because "the Government intentionally withheld exculpatory evidence regarding [his] tax liability." [Doc. 340-4 at 3.] Atkin acknowledges, however, that he previously presented this argument to the Court in his Rule 60(b) motion, which the Court has already decided. As this issue has been considered in a prior proceeding, Atkin is not entitled to *coram nobis* relief on this basis.

Moreover, Atkin argues that recent Supreme Court decisions have altered the application of the statute pursuant to which Atkin was convicted of obstruction of justice. [*Id.* at 3-4.] Atkin does not identify these decisions, however. Further, even if the Court assumes that Atkin is correct, the existence of new case law does not warrant the issuance of a writ of *coram nobis*, as it does not constitute an error of *fact* unknown at the time of trial that may have altered the outcome of the trial.

Because Atkin cannot establish that he is entitled to *coram nobis* relief, the Court need not consider (nor would it have been required to consider) whether Atkin's convictions have resulted in a civil disability.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Defendant Atkin's petition for a writ of *coram nobis* and his motion for appointment of counsel.

IT IS SO ORDERED.

Dated: May 27, 2009

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE